

# Catholic University Law Review

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Volume 12 | Issue 1

Article 4

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1963

## Immunity from Service of Process – How Far Can We Stretch Stewart v. Ramsay? – Greene v. Weatherington

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### Recommended Citation

Joseph J. Baker, *Immunity from Service of Process – How Far Can We Stretch Stewart v. Ramsay? – Greene v. Weatherington*, 12 Cath. U. L. Rev. 46 (1963).

Available at: <https://scholarship.law.edu/lawreview/vol12/iss1/4>

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## Comment / Immunity from Service of Process—

How far can we stretch *Stewart v. Ramsay*?—

*Greene v. Weatherington*

UNDER THE AMERICAN SYSTEM OF JURISPRUDENCE, a person who enters a foreign jurisdiction in any one of three capacities, witness, suitor, or officer of the court, is immune from service of process *eundo, morando, et redeundo* (going, remaining, and returning from the place of suit). This general rule is found not only in the case law of this country<sup>1</sup> but also in many of the state statutes.<sup>2</sup>

In a recent District of Columbia case, *Greene v. Weatherington*,<sup>3</sup> a further extension of the immunity privilege was sought. Until that case the question of whether to grant immunity from service of process in a civil action to a criminal defendant had never been raised. That case involved a Maryland resident who was arrested within the District of Columbia for the alleged shooting of appellant's minor son. He was thereafter charged with the crimes of assault with a dangerous weapon and carrying a dangerous weapon. Upon posting bond he was released pending a preliminary hearing and was held for action by the grand jury. During the processing of a future bond he was placed in jail, and while still detained he was served in a civil action filed in the District of Columbia by appellants claiming damages alleged to have grown out of the shooting incident. Appellée moved to quash service of the summons, contending that in these circumstances he was immune from service of process. The court granted the motion. An appeal was taken from the order denying appellant's motion to set aside the order quashing service, and

<sup>1</sup> *Lamb v. Schmitt*, 285 U.S. 222 (1932); *Caldwell v. Caldwell*, 189 Misc. 845, 70 N.Y.S. 2d 601 (1947).

<sup>2</sup> N.J. STATS. ANN. (N.J.S.A. 2A: 81-21) (1960); ANN. IND. STATS. (BURN'S ANN. ST., §9-1628) (1933); ANNOTATED CALIFORNIA CODE (WEST'S ANN. PEN. CODE, §§1334-1334.6) (1956).

<sup>3</sup> 112 U.S. App. D.C. 241, 301 F. 2d 565 (1962).

the motion to quash service was reversed. Interpreting a past Supreme Court decision,<sup>4</sup> the court held that because appellee was before the court in response to his obligation under bond, he was not in this jurisdiction voluntarily; thus the privilege of immunity from service of civil process did not attach.

The fact situation of *Greene v. Weatherington* is not novel in the law. The courts have been dealing with the question of whether to grant immunity to non-resident witnesses and suitors for a number of years. However the case law becomes a maze of conflicting decisions and rationalizations when the rule is applied in criminal cases to defendants who seek protection under the privilege.

Immunity from service of process is of ancient origin and is mentioned in the Year Books as early as Henry VI.<sup>5</sup> It attached to parties to judicial proceedings and allowed the parties to go where the proceedings were held, remain as long as necessary and return wholly free from the restraint of process in other civil proceedings. A similar exemption has been enjoyed by members of Parliament summoned by the King's writ since the days when Parliament<sup>6</sup> was still regarded as a court.<sup>7</sup> After legislative and judicial functions of government were localized, this privilege of legislators was continued by statute in England<sup>8</sup> and is provided for generally by constitutional provisions in the United States.<sup>9</sup>

The American courts generally grant immunity to suitors and witnesses in civil cases from service of process while in the jurisdiction for the purpose of attending to matters concerning the litigation.<sup>10</sup> Usually one of these four principles forms the basis for the decision: the courts ought everywhere to be open to all;<sup>11</sup> the due administration of justice;<sup>12</sup> public policy;<sup>13</sup> or the dig-

<sup>4</sup> *Lamb v. Schmitt*, *supra* note 1.

<sup>5</sup> Year Book, 20 Henry VI, 1 Tidd's Pr. 196 (1840); *Starret's Case*, 1 Dall. 357, 1 L. Ed 174 (1788); *Hurst's Case*, 4 Dall. 387, 1 L. Ed. 878 (1804).

<sup>6</sup> "The privilege rests on the supreme necessity of attending the business of Parliament, the King's highest court". 3 STUBBS, CONST. HIST. OF ENG. 495 (1929).

<sup>7</sup> See MCILWAIN, THE HIGH COURT OF PARLIAMENT AND ITS SUPREMACY, Ch. 3 (1910) Cf. "A prayer for the High Court of Parliament", BOOK OF COMMON PRAYER.

<sup>8</sup> Act 10 Geo. III, c. 50 (1761).

<sup>9</sup> U.S. CONST. art. I, §6, para. I; 1 STIM. AM. ST. LAW. 86 (1886).

<sup>10</sup> *Stewart v. Ramsay*, 242 U.S. 128 (1916); *Moseley v. Ricks*, 223 Iowa 1038, 274 N.W. 23 (1937); *Diamond v. Earle*, 217 Mass. 499, 105 N.E. 363 (1914); *Cooper v. Wyman*, 122 N.C. 784, 29 S.E. 497 (1898); 72 C.J.S. *Process* §80 (1951).

<sup>11</sup> *Stewart v. Ramsay*, *supra* note 10; *Halsey v. Stewart*, 4 N.J.L. 366 (1817).

<sup>12</sup> *Page Co. v. MacDonald*, 261 U.S. 446 (1923); *Stratten v. Hughes*, 211 F. 557 (D.C.N.J. 1914); *Chittenden v. Carter*, 82 Conn. 585, 74 A. 884 (1909); *Matthews v. Tufts*, 87 N.Y. 568 (1882); *Sherman v. Gundlach*, 37 Minn. 118, 33 N.W. 549 (1887); *Martin v. Bacon*, 76 Ark. 158, 88 S.W. 863 (1905).

<sup>13</sup> *Chittenden v. Carter*, 82 Conn. 585, 74 A. 884 (1909); *Powell v. Pangborn*, 161 App. Div. 453, 145 N.Y. Supp. 1073 (2d Dept. 1914); *Rizo v. Burrue*, 23 Ariz. 137, 202 P. 234 (1921); *Wilson v. Donaldson*, 117 Ind. 356, 20 N.E. 250 (1888); *Halsey v. Stewart*, 4 N.J.L. 366 (1817).

nity of the court.<sup>14</sup> A problem arises when the courts wish to extend the immunity rule as it applied in civil cases to criminal cases.<sup>15</sup>

Courts have found several ways of granting immunity to defendants in criminal cases. They have held that justice can best be served if those charged with crime are encouraged to enter the jurisdiction voluntarily, thus saving the state the expense of extradition,<sup>16</sup> or that a defendant answering criminal charges should not be subject to distraction and harassment by those wishing to serve him with civil process.<sup>17</sup> If the offense is not serious enough to justify extradition, a defendant may feel he can successfully defend against the minor criminal prosecution but not the civil one. Immunity would, therefore, encourage him to enter voluntarily.<sup>18</sup>

One court felt that failure to grant immunity to a non-resident criminal defendant would force the person to stand trial in a foreign jurisdiction without the benefit of a jury chosen from the vicinity in which he resides so his true conduct and character can be taken into consideration and at a great extra expense.<sup>19</sup>

Some of these courts agree that it is necessary to encourage voluntary appearances by non-residents so that the courts may function, however, a problem arises when an answer is sought to the question of what constitutes voluntary appearance.<sup>20</sup> It is felt that if the defendant can be compelled to appear by extradition or other means, then he is not appearing voluntarily and immunity does not attach to him.<sup>21</sup> They claim this is solely a benefit to the defendant and in no way furthers the administration of justice. Whether this holds true when a defendant is appearing under or in response to bail is another question. There are two views, one holding that a person out on bail is as free as any other person so long as he keeps the terms of his bond and retains the confidence of his sureties;<sup>22</sup> the other holding that one at large

<sup>14</sup> *Parker v. Marco*, 136 N.Y. 585, 32 N.E. 989 (1893); *Finucane v. Warner*, 194 N.Y. 160, 86 N.E. 1118 (1893).

<sup>15</sup> "... nowhere is there more confusion than in the cases concerning non-resident defendants in criminal actions". Keffe and Roscia, *Immunity and Sentimentality*, 32 CORN. L.Q. 471, 486 (1947).

<sup>16</sup> *Church v. Church*, 270 F. 361, 14 A.L.R. 769 (D.C. Cir. 1921); *Morris v. Calhoun*, 119 W. Va. 603, 195 S.E. 341 (1938).

<sup>17</sup> *Silvey v. Koppell*, 107 S.C. 106, 91 S.E. 975 (1917); *Feuster v. Redshaw*, 157 Md. 302, 145 A. 560 (1929).

<sup>18</sup> 10 WASH. & LEE L. REV. 78, 81 (1953).

<sup>19</sup> *Whited v. Philips*, 98 W. Va. 204, 126 S.E. 916 (1925).

<sup>20</sup> ANDERSON, JUDICIAL WRITS AND PROCESS 273; 72 C.J.S. *Process*, §82 (1951); 42 AM. JUR. *Process*, §138 (1942); *Palmer v. Rowan*, 21 Neb. 452, 32 N.W. 210 (1887); *Ryan v. Ebecke*, 102 Conn. 12, 128 A. 14 (1925).

<sup>21</sup> "The reason of the [immunity] rule fails when a party to a suit is brought into the jurisdiction of the court under arrest or other compulsion of law. Such a party does nothing to encourage or promote voluntary submission to judicial proceedings. He comes because he cannot do otherwise." *Moore v. Green*, 73 N.C. 394, 21 Am. St. Rep. 470 (1875); *Anderson v. Atkins*, 16 Tenn. 137, 29 S.W. 2d 248 (1930); *Crusco v. Strunk Steel Co.*, 365 Pa. 326, 74 A. 2d 142, 20 A.L.R. 2d 160 (1950); *Broadbuss v. Patrick*, 177 Tenn. 335, 149 S.W. 2d 71 (1941).

<sup>22</sup> *Michaelson v. Goldfarb*, 94 N.J.L. 352, 110 A. 710 (1920).

on bail is constructively in the custody of the law.<sup>23</sup> Courts which fail to grant immunity to non-resident criminal defendants appearing under bail base their decisions on this latter view.<sup>24</sup>

The problem was first considered by the United States Supreme Court in 1916 in *Stewart v. Ramsay*.<sup>25</sup> The Court held that a non-resident plaintiff who was bringing a civil suit in a foreign jurisdiction, was immune from service of civil process in a second suit. It went on to say that a court in one state cannot acquire jurisdiction over a citizen and resident of another through civil process served upon him while in attendance on such court as suitor or witness.<sup>26</sup> The rule on which the court based its decision is that suitors, as well as witnesses, coming from another state or jurisdiction, are exempt from the service of civil process while in attendance upon court, and during a reasonable time in coming and going.

The New Jersey Supreme Court nearly one hundred and fifty years ago enunciated its rule in *Halsey v. Stewart*<sup>27</sup> upon the following reasoning:

Courts of justice ought everywhere to be open, accessible, free from interruption, and cast a perfect protection around every man who necessarily approaches them. The citizen, in every claim of right which he exhibits, and every defense which he is obliged to make, should be permitted to approach them, not only without subjecting himself to evil, but even free from the fear of molestation or hindrance. He should also be enabled to procure, without difficulty, the attendance of all such persons as are necessary to manifest his rights. Now, this great object in the administration of justice would in a variety of ways be obstructed, if parties and witnesses were liable to be served with process, while actually attending court. It is often matter of great importance to the citizen, to prevent the institution and prosecution of a suit in any court, at a distance from his home and his means of defense; and the fear that a suit may be commenced there by summons, will as effectually prevent his approach as if a *capias* might be served upon him. This is especially the case with citizens of neighboring states, to whom the power which the court possesses of compelling attendance, cannot reach.<sup>28</sup>

And some thirty years later a federal court declared:

The privilege which is asserted here is the privilege of the court, rather than that of the defendant. It is founded on the necessities of judicial administration,

<sup>23</sup> *Netograph Mfg. Co. v. Scrugham*, 197 N.Y. 377, 27 L.R.A. (N.S.) 333, 134 Am. St. Rep. 886, 90 N.E. 962 (1910).

<sup>24</sup> *Ibid.*

<sup>25</sup> 242 U.S. 128 (1916).

<sup>26</sup> *Id.* at 129.

<sup>27</sup> 4 N.J.L. 366 (1817).

<sup>28</sup> *Id.* at 368.

which would often be embarrassed, and sometimes interrupted, if the suitor might be vexed with process while attending upon the court for the protection of his rights, or the witness while attending to testify. Witnesses would be chary of coming within our jurisdiction, and would be exposed to dangerous influences, if they might be punished with a law suit for displeasing parties by their testimony; and even parties in interest, whether in the record or not might be deterred from the rightfully fearless assertion of a defense, if they were liable to be visited on the instant with writs from a defeated party.<sup>29</sup>

It is true that *Stewart v. Ramsay* was civil in nature; however, the principles set forth should apply to both civil and criminal cases. Early English cases followed a general rule that any person having a connection with a suit, be it civil or criminal, was immune from service of process without regard to the distinction of whether his appearance was voluntary or involuntary.<sup>30</sup>

In 1921 the United States Court of Appeals for the District of Columbia took the rule set forth in *Stewart v. Ramsay*, *supra*, and applied it to a criminal defendant in *Church v. Church*,<sup>31</sup> holding him immune from service of process in a civil action, while appearing within the District of Columbia for purposes of the criminal action and for a reasonable time thereafter in order for the defendant to return to his abode. In a recent District of Columbia case, *The Dominican Republic v. Roach*,<sup>32</sup> this court felt the broad rule in *Church v. Church* was subject to limitations and certain exceptions. The court applied the *Church* rule to a limited extent as required by the facts in the particular case, *i.e.*, voluntary appearance to criminal charges. The instant case of *Greene v. Weatherington* now deals with the question of the involuntary appearance of a defendant to criminal charges.

The Supreme Court in *Stewart v. Ramsay* made no distinction between voluntary and involuntary appearances, and quoted with approval the words of the New Jersey Supreme Court in *Halsey v. Stewart*.<sup>33</sup> The court in *Greene v. Weatherington* stated: "the principal reason for granting immunity was to encourage voluntary cooperation with judicial administration."<sup>34</sup> This they claimed was the rule in civil and criminal cases. Which approach is right?

Looking through the eyes of the court in the *Greene* case at the fact situation in *Stewart v. Ramsay*, the court would have to admit the plaintiff in that case was doing absolutely nothing "to encourage the voluntary cooperation with judicial administration" which it considered the primary object of the rule to promote. The plaintiff was before the court solely to benefit himself.

<sup>29</sup> *Parker v. Hotchkiss*, 1 Wall. Jr. 269 (1849).

<sup>30</sup> *Meekins v. Smith*, 1 Hen. Black. 636 as cited in *Ex Parte Jackson*, 33 Eng. Rcp. 699 (1808).

<sup>31</sup> 270 F. 361, 14 A.L.R. 769 (D.C. Cir. 1921).

<sup>32</sup> 108 U.S. App. D.C. 51, 280 F. 2d 59, *cert. denied*, 364 U.S. 878 (1960).

<sup>33</sup> 4 N.J.L. 366 (1817).

<sup>34</sup> 112 U.S. App. D.C. at 244, 301 F. 2d at 568 (1962).

Voluntary cooperation has come to mean purely volitional as opposed to being compelled by law (subpoena, extradition, etc.). The Court in *Stewart v. Ramsay* did not grant immunity to the plaintiff to encourage him to appear because they could not compel his presence by law, for who can compel a person to bring suit in a foreign jurisdiction? Following this to its logical conclusion, the court under its reasoning in the *Greene* case would be unable to grant immunity to a non-resident plaintiff, as, according to that case there is no basis for granting immunity other than to encourage the appearance of one who cannot be compelled by law.

However, many courts do grant immunity to non-resident plaintiffs;<sup>35</sup> hence, there must be more to the rule than the narrow interpretation given it by the court in the *Greene* case. Indeed there is a great deal more, *i.e.*, the right of a citizen to expect "the courts of justice everywhere . . . to be open, accessible, free from interruption, and to cast a perfect protection around every man who necessarily approaches them."<sup>36</sup> Is this not a greater right than allowing a person to serve process on a plaintiff or defendant anywhere under any circumstances?

If the rule set forth in *Stewart v. Ramsay* is sound and a non-resident plaintiff is granted immunity under it, with no intent on the part of the Court to encourage voluntary appearances as they have come to mean in the *Greene* case, what is to prevent a court from granting immunity to a non-resident criminal defendant who is entering a foreign jurisdiction to answer criminal charges irrespective of whether his appearance is voluntary or involuntary?<sup>37</sup> The true rule as stated before refers to *suitors* and *witnesses*. A suitor is a party to a suit or action in court<sup>38</sup> and a witness is one who testifies to what he knows.<sup>39</sup> A defendant in a criminal action is both of these: he is a party to the action and can testify in his own behalf as a witness. His presence is necessary because there could be no trial without him. The administration of justice can as easily be embarrassed and interrupted if the defendant in a criminal case is vexed with process while attending upon the court. He might easily be deterred from the rightful and fearless assertion of a defense. It is not uncommon to see a criminal defendant plead guilty to a lesser offense lest he expose himself to possible civil litigation which might be brought had he

<sup>35</sup> *Christion v. Williams*, 35 Mo. App. 297 (1889); *Halsey v. Stewart*, *supra* note 11; *In re Healey*, 53 Vt. 694 (1881).

<sup>36</sup> *Halsey v. Stewart*, *supra* note 11, at 368.

<sup>37</sup> The same question was raised in Note, 20 ILL. L. REV. 172 (1925).

<sup>38</sup> A party to a suit or action in court. In its ancient sense, "suitor" meant one who was bound to attend the county court; also one who formed part of the *secta*. BLACK, LAW DICTIONARY (4th ed. 1951).

<sup>39</sup> One who, being present, personally sees or perceives a thing; a beholder, spectator, or eye-witness. BLACK, LAW DICTIONARY (4th ed. 1951); *In re Harter's Estate*, 229 Iowa 238, 294 N.W. 357 (1940).

unsuccessfully defended the original charge. It is no more pleasant or just for a criminal defendant to be subject to litigation in a foreign jurisdiction than it is for a civil plaintiff or defendant.

Further, why should a person charged with crime, who under our system of law is presumed innocent until proven guilty, be subject to service in a civil action which might or might not have arisen out of the commission of the crime. If the civil action has no relation to the crime charged, the plaintiff is not unduly injured by his inability to validly serve his summons; he can get service in the defendant's home state. He would have to do so, had the person charged with crime not appeared within the claimant's jurisdiction. If the civil action can be said to have flowed from the commission of the crime, allowing the plaintiff service of process on the presumptively innocent defendant would be giving an unfair advantage to the plaintiff in a civil proceeding where both parties should have equal standing.

#### CONCLUSION

That there is confusion and uncertainty in this area of the law cannot be denied.<sup>40</sup> It is the opinion of this commentator that there are but two avenues which the courts may take to arrive at some just and uniform law in the area of immunity. One is that *Stewart v. Ramsay* be recognized as a bad precedent, and the principles which come to us from the common law be reinterpreted as holding only those parties to an action whose appearance cannot be compelled by law eligible for immunity from service of process. The second is to allow *Stewart v. Ramsay* to stand and grant immunity to *all* non-resident witnesses and suitors who appear either voluntarily or under compulsion of law. For the court in the *Greene* case to ignore the principles set forth in *Stewart v. Ramsay* and deny immunity from service of process to criminal defendants who appear under compulsion of law is but to add to the inextricable dilemma which already surrounds cases in this field.

JOSEPH J. BAKER

<sup>40</sup> Keeffe and Roscia, *op. cit. supra* note 15.